

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs June 26, 2007

STEVEN L. SMITH v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 80586 Ray L. Jenkins, Judge

No. E2006-01838-CCA-R3-PC - Filed October 31, 2007

The petitioner, Steven L. Smith, appeals from the Knox County Criminal Court's dismissal of his petition for post-conviction relief from his conviction for burglary of a business. He was sentenced to seven years as a Range II, Multiple Offender. The petitioner contends the trial court erred in dismissing his petition without a hearing after he moved for a continuance. We reverse and remand the case for an appropriate evidentiary hearing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed,
Case Remanded**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and D. KELLY THOMAS, JR., JJ., joined.

Albert J. Newman, Jr., Knoxville, Tennessee, for the appellant, Steven L. Smith.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Philip H. Morton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner filed a pro se post-conviction petition in August 2004. The trial court appointed counsel, who amended the petition. According to a statement by the assistant district attorney general on the record on the date the case was dismissed in August 2006, the case had been "on the docket several times" and had been set for hearing in May but continued at the petitioner's request. At the hearing, the petitioner's attorney moved for a continuance based upon a letter to counsel from the petitioner dated June 16, 2006. In pertinent part, the letter states:

Thank you for the letter informing me of my new court date. The reason I'm writing this letter is to ask you if [it's] possible to have my next court date set off until I graduate from the drug and alcohol

treatment program here at West Tennessee State Prison. The Parole Board recommended I take this program before my next hearing in April of 2007 before being considered for release. I start in July and the program lasts 9 months and I fear any interruptions will result in my [losing] my position in the program. It's an intensive program and the waiting list is very long.

After counsel made this request, the court dismissed the case. The court did not state its reasons for doing so.

A trial court may dismiss a post-conviction petition if the record reflects bad faith conduct or abuse of the process on the part of the petitioner. Williams v. State, 831 S.W.2d 281, 283 (Tenn. 1992); see Almeer Nance v. State, No. E2005-02265-CCA-R3-PC, Knox County (Tenn. Crim. App. June 9, 2006); Charles Ritter v. State, No. E2003-03016-CCA-R3-PC, Knox County (Tenn. Crim. App. Oct. 14, 2004). In the present case, the trial court made no findings of bad faith or abuse of process. Dismissal without such a finding was error. The state agrees.

CONCLUSION

We reverse the order of the trial court dismissing the petition. We remand for an evidentiary hearing to determine whether the petitioner was acting in bad faith or abusing the process. If the court finds that the petitioner acted in bad faith or abused the process in delaying the proceedings, it may dismiss the petition. However, if it finds that the petitioner did not engage in wrongful or abusive conduct, it shall proceed to a hearing on the merits of the petition.

JOSEPH M. TIPTON, PRESIDING JUDGE